IN THE

Supreme Court of the United States

October Term, 1967

No. 949

RUBEN K. KING, Commissioner of the State Department of Pensions and Security, State of Alabama; LURLEEN BURNS WALLACE, Chairman, State Board of Pensions and Security, State of Alabama; JAMES RECORD, MRS. MARY WAITE, WILLIAM M. CLARKE, TEMPLE COLEY, GRANT WHIDDON, MRS. MARY ELLA REAVIS, Members of the State Board of Pensions and Security, State of Alabama; MRS. CLINTON S. WILKINSON, SR., Director, Dallas County, Department of Pensions and Security, Individually and in their official capacities,

Appellants,

—v.—

MRS. SYLVESTER SMITH, individually, and on behalf of her minor children, IDA ELIZABETH SMITH, ERNESTINE SMITH, WILLIE LOUIS SMITH and WILLIE JAMES SMITH and on behalf of all other mothers of needy, dependent children similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT, AND THE CENTER ON SOCIAL WELFARE POLICY AND LAW

EDWARD V. SPARER
127 Wall Street
New Haven, Conn.

PAUL DODYK
BRIAN GLICK
401 West 117th Street
New York, New York 10027

Attorneys for the Center on Social Welfare Policy and Law

JACK GREENBERG
JAMES M. NABRIT, III
LEROY D. CLARK
CHARLES STEPHEN RALSTON
10 Columbus Circle
New York, New York 10019

Attorneys for the NAACP Legal Defence and Educational Fund, Inc., and National Office for the Rights of the Indigent

TABLE OF CONTENTS

PAGE

Motion for Leave to File Brief *Amici Curiae* and Statement of Interest of the *Amici* 1

Summary of Argument 1

ARGUMENT:

It Is of Utmost Importance That This Court Hold in This Case That the Social Security Act and the Equal Protection Clause Prohibit State Rules Which Deny ADC to Needy Children by Defining as a "Parent" Any Person Not Legally Obligated to Support Those Children 4

I. The Alabama Substitute-Father Rule at Issue Here Is Only One of Many Forms of Substitute-Father Rule. A Variety of Other Definitions of "Parent," All Unrelated to Legal Responsibility for Financial Support, Are in Force in Many States and Have Been Employed by Alabama 4

II. Any Definition of "Parent" for Purposes of ADC Eligibility Which Is Not Limited to Persons Under a Legal Duty to Provide Financial Support Conflicts With the Purposes of Title IV of the Social Security Act 12

A. Title IV Creates a Right to Aid for All Eligible Children and Prohibits Eligibility Requirements Not Reasonably Related to the Purpose of the Title 12

PAGE

B. Legislative History, Statutory Context, and Administrative Interpretation Make it Clear that Title IV Was Intended to Aid All Needy Children Deprived of the Financial Support of a "Parent" Legally Obligated to Provide that Support 15

1. The Legislative History of Section 406(b) and the Congressional Concern With "Breadwinners" 16

2. The Meaning of the Word "Parent" as It Is Used Elsewhere in Title IV of the Social Security Act 20

C. The Purpose of Title IV is Contravened by ADC Eligibility Rules which Treat as a "Parent" Persons Not Legally Responsible for Financial Support 23

III. Any Definition of "Parent" for Purposes of ADC Eligibility Which Is Not Limited to Persons Under a Legal Duty to Provide Financial Support Violates the Equal Protection Clause 26

A. Definitions of Parent Which Include Persons Not Under a Duty of Legal Support so as to Deprive Children of Needed Aid Are Void Under the Ordinary Principles of Equal Protection Because Such Definitions Bear No Rational Relation to the Purpose of Title IV or Any Other Permissible State Use of the ADC Program 26

PAGE

B. Special Scrutiny of ADC Eligibility Rules Is Required Because of Their Drastic Effect on the Ability of the Very Poorest and Most Helpless Children to Maintain Life Itself 36

CONCLUSION 41

Appendix A—

Excerpts from Parts IV and V of the Handbook of Public Assistance Administration, United States Department of Health, Education, and Welfare 1a

Appendix B—

Alabama's Substitute Father ADC Eligibility Rules 5a

Appendix C—

Other Substitute Father ADC Eligibility Rules 9a

Appendix D—

Other States Which Define a Stepfather as a Parent for Purposes of ADC Eligibility But Impose No Duty of Support on Stepfathers by Virtue of the Marital Status Alone 40a

TABLE OF CASES

	PAGE
Bell v. Maryland, 378 U.S. 226	39
Brown v. Board of Education, 347 U.S. 483	39
Chandler v. Whatley, 238 Ala. 206, 189 So. 751 (1939)	21
Collins v. State Board of Social Welfare, 248 Iowa 369, 81 N.W.2d 4 (1957)	34
Edwards v. California, 314 U.S. 160	34, 39
Englehardt v. Yung's Heirs, 76 Ala. 534 (1884)	21, 33
Franklin v. White, 263 Ala. 223, 82 So.2d 247 (1955)	21
Griffin v. Bonin, W.D. La., C.A. 13,521 (March 7, 21, 1968)	7, 40
Griffin v. Illinois, 351 U.S. 12	37
Griswold v. Connecticut, 381 U.S. 479	37
Gulf, Colorado and Santa Fe Ry. Co. v. Ellis, 165 U.S. 150	27, 36
Harper v. Virginia Board of Elections, 383 U.S. 663	30, 37
Hartford Steam Boiler Inspection Co. v. Harrison, 301 U.S. 459	36
Heiner v. Donnan, 285 U.S. 312	25
Hobson v. Hansen, 269 F. Supp. 401 (D. D.C. 1967)	37
McGowan v. Maryland, 366 U.S. 420	38
McLaughlin v. Florida, 379 U.S. 184	30
McPherson v. California, N.D. Calif., C.A. No. 46759 (June 29, 1967)	24
Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580	37
Mobile, J.&K.C.R. Co. v. Turnipseed, 219 U.S. 35	25
Morgan v. United States, 298 U.S. 468	13

PAGE

Nicholas v. State, 32 Ala. App. 574, 28 So.2d 422 (1946) 21
N.L.R.B. v. Express Publishing Co., 312 U.S. 426 13

Oyama v. California, 332 U.S. 633 38

Rios v. Hackney, N.D. Tex. C.A. No, 3-1852 (Nov. 30, 1967) 10
Roussaw v. Burson, M.D. Ga., C.A. No. 2323 (March 18, 22, 1968) 8, 40

Skinner v. Oklahoma, 316 U.S. 535 37

Takahasi v. Fish and Game Commission, 334 U.S. 410 38
Truax v. Raich, 239 U.S, 33 38

United States v. Carolene Products Co., 304 U.S. 144 38

Williams v. Witherspoon, 171 Ala. 559, 55 So. 132 (1911) 21

Yick Wo v. Hopkins, 118 U.S. 356 38

Statutes:

42 U.S.C. §602(a)(4) 13
42 U.S.C. §602(a)(7) 29
42 U.S.C. §602(a)(10) 12
42 U.S.C. §602(a)(15)(B) and (C) 30
42 U.S.C. §604(b) 35
42 U.S.C. §606(a) 4
42 U.S.C. §606(b) 14
42 U.S.C. §607 15

PAGE

Pub. L. 87-543, §107(b) (1962) 35

Social Security Act, Title IV:

§402(a)(4) 13
§402(a)(10) 12
§402(a)(11) 20, 21, 23
§402a(15)(B) and (C) 30
§406(a) 4, 15, 16, 18, 20, 21, 22, 23
§406(b) 14, 20, 22, 23
§407 15

Alabama Support and Desertion Laws, Code of Alabama, Title 34, §§89-104 29

Code of Alabama, Tit. 7, §123 21

Code of Alabama, Tit. 26, §262(b) 21

Code of Alabama, Tit. 27, §5 21

Code of Alabama, Tit. 27, §6 21

Code of Alabama, Title 27, §§12(1)-12(9) 29

Code of Alabama, Tit. 34, §89 21

Code of Alabama, Tit. 34, §90 21

Code of Alabama, Tit. 49, §17(14) 16

Other Authorities:

Ala. Manual of Public Assistance Administration, Pt. I, Chap. II, p. 36 22

Atkinson, Handbook of the Law of Wills, §18 (2d ed. 1953) 21

Bell, AID TO DEPENDENT CHILDREN (1965) 8, 29

PAGE

Black, Law Dictionary (4th ed. 1957) 19

Hearings on Hunger and Malnutrition in America, before the Subcommittee on Employment, Manpower and Poverty of the Committee on Labor and Public Welfare, U.S. Senate, 90th Cong., 1st Sess. (July 11, 12, 1967) 39

79 Cong. Rec. 5476, 74th Cong., 1st Sess. (1935) 18

HEW, Handbook of Public Assistance Administration:

Introduction 13
Pt. II, §4300 13
Pt. IV, §2200 14
Pt. IV, §2321 13
Pt. IV, §3131(7) 24
Pt. IV, §3412 ..... 19, 32
Pt. IV, §5120 14
Pt. IV, §§8100-8149 21
Pt. IV, §8131(2) 22
Pt. V, §3320 22

HEW, *Illegitimacy and Its Impact on the Aid to Dependent Children Program* (1960) 15

H.R. Doc. No. 81, 74th Cong., 1st Sess. (1935) 16, 17

H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935) 17

2 Larson, *Workman's Compensation,* §63 (1961) 21

Lewis and Levy, *Family Law and Welfare Policies: The Case for 'Dual Systems,'* 54 Calif. L. Rev. 748 (1966) 24

McKay, *Reapportionment and Equal Protection,* 61 Mich. L. Rev. 645 (1963) 38

PAGE

California Public Social Service Manual, §44-101, item 17 24

S. Rep. No. 628, 74th Cong., 1st Sess. (1935) 17

Speiser, *Recovery for Wrongful Death*, §10:8 (1967) 21

State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education and Welfare 35

tenBroek, *The Impact of Welfare Law upon Family Law*, 42 Calif. L. Rev. 458 (1954) 33

Webster, *New World Dictionary* (College Ed. 1956) 18

Welfare's "Condition X," 76 Yale L.J. 1222 (1967) 14, 15, 24, 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 949

RUBEN K. KING, Commissioner of the State Department of Pensions and Security, State of Alabama; LURLEEN BURNS WALLACE, Chairman, State Board of Pensions and Security, State of Alabama; JAMES RECORD, MRS. MARY WAITE, WILLIAM M. CLARKE, TEMPLE COLEY, GRANT WHIDDON, MRS. MARY ELLA REAVIS, Members of the State Board of Pensions and Security, State of Alabama; MRS. CLINTON S. WILKINSON, SR., Director, Dallas County, Department of Pensions and Security, Individually and in their official capacities,

Appellants,

—v.—

MRS. SYLVESTER SMITH, individually and on behalf of her minor children, IDA ELIZABETH SMITH, ERNESTINE SMITH, WILLIE LOUIS SMITH and WILLIE JAMES SMITH and on behalf of all other mothers of needy, dependent children similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF THE *AMICI*

Movants NAACP Legal Defense and Educational Fund, Inc., National Office for the Rights of the Indigent, and Center on Social Welfare Policy and Law respectfully move the Court for permission to file the attached brief *amici curiae*, for the following reasons. The reasons assigned also disclose the interest of the *amici*.

(1) Movant NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

(2) A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless, who too often are Negroes. In order more effectively to achieve this purpose, the LDF in 1965 established as a separate corporation movant National Office for the Rights of the Indigent (NORI). This organization, whose income is provided initially by a grant from the Ford Foundation, has among its objectives the provision of legal representation to the poor in individual cases and the presentation to appellate courts of arguments for changes and developments in legal doctrine which unjustly affect the poor. Thus NORI is engaging in legal research and litigation (by providing counsel for parties, as *amicus curiae*, or co-counsel with legal aid organizations) in cases in which rules of law may be established or interpreted to provide greater protection for the indigent.

(3) In carrying out this program to establish the legal rights of the poor LDF and NORI attorneys have handled, *inter alia*, cases involving public and private housing,[1] consumer fraud and credit, and a number of cases dealing with rights of welfare recipients. These include actions challenging a Georgia "employable mother" regulation,[2] a Missouri residency requirement,[3] a Mississippi procedure that gives a recipient a fair hearing only *after* benefits have been terminated,[4] and a Maryland regulation that places a fixed upper limit on the amount any family may receive regardless of its size.[5] In addition, LDF and NORI attorneys are assisting or have assisted legal aid and neighborhood legal services groups in similar suits in California, Ohio, and elsewhere.

(4) The Center on Social Welfare Policy and Law is the specialized welfare law resource of the Legal Services Program of the Office of Economic Opportunity. Affiliated with the Schools of Law and Social Work of Columbia University, the Center undertakes research pertaining to the legal rights of welfare beneficiaries and supports OEO-funded legal service programs and other legal organizations such as LDF and NORI through education and assistance in the preparation of important litigation. The Center also maintains the nation's only comprehensive private collection of state public assistance regulations and manuals.

---

[1] E.g., *Thorpe* v. *Housing Authority of the City of Durham*, 386 U.S. 670; *Williams* v. *Shaffer*, 385 U.S. 1037.

[2] *Anderson* v. *Burson*, N.D. Ga., C.A. No. 10443.

[3] *Northway* v. *Carter*, D.C. Mo. C.A. No. 67-C-292.

[4] *Williams* v. *Gandy*, N.D. Miss., C.A. No. GC 6728.

[5] *Williams* v. *Dandridge*, D.C. Md., C.A. No. 19250.

(5) The Center has concerned itself with many basic legal issues in the welfare field including residence tests, work requirements, welfare searches, maximum family grants, and various procedural questions. Foremost among these issues have been the substitute-father and man-in-the-house rules in public assistance. The Center has assisted in numerous administrative hearings and court cases involving substitute-father rules as they affect eligibility and computation of need. In February 1966, attorneys of LDF and the Center, filed a complaint with the Secretary of the United States Department of Health, Education, and Welfare, on behalf of LDF and named individuals, seeking to have the substitute father regulations of Georgia and Arkansas, which are similar to Alabama's, declared violative of the Fourteenth Amendment and the Social Security Act. Despite repeated requests addressed to the Secretary for action on the complaint, none has been taken in the two years since its filing. OEO-funded neighborhood legal service programs in Louisiana, Georgia, and the District of Columbia currently have pending in the federal district courts substitute-father cases for which Center attorneys are serving as special counsel. LDF, NORI, and the Center, together with these neighborhood programs and the 247 other federally-funded legal service programs throughout the nation, have a vital interest in presenting to this Court the full range of issues raised and rules affected by this case.

(6) Counsel for the appellees have consented to the filing of a brief *amici curiae* by the movants. The present motion is necessitated because counsel for the appellants have refused consent.

WHEREFORE, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
LEROY D. CLARK
CHARLES STEPHEN RALSTON
10 Columbus Circle
New York, New York 10019

Attorneys for the NAACP Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent

EDWARD V. SPARER
127 Wall Street
New Haven, Conn.

PAUL DODYK
BRIAN GLICK
401 West 117th Street
New York, New York 10027

Attorneys for the Center on Social Welfare Policy and Law

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 949

RUBEN K. KING, Commissioner of the State Department of Pensions and Security, State of Alabama; LURLEEN BURNS WALLACE, Chairman, State Board of Pensions and Security, State of Alabama; JAMES RECORD, MRS. MARY WAITE, WILLIAM M. CLARKE, TEMPLE COLEY, GRANT WHIDDON, MRS. MARY ELLA REAVIS, Members of the State Board of Pensions and Security, State of Alabama; MRS. CLINTON S. WILKINSON, SR., Director, Dallas County, Department of Pensions and Security, Individually and in their official capacities,

Appellants,

—v.—

MRS. SYLVESTER SMITH, individually, and on behalf of her minor children, IDA ELIZABETH SMITH, ERNESTINE SMITH, WILLIE LOUIS SMITH and WILLIE JAMES SMITH and on behalf of all other mothers of needy, dependent children similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

BRIEF *AMICI CURIAE*

Summary of Argument

I

The Alabama substitute-father rule here in question is but one of a variety of similar rules used by a minority

of states. Indeed, during the course of this litigation, Alabama has employed two other versions of the rule. The regulations restrict eligibility of needy dependent children for benefits under Title IV of the Social Security Act. Although they vary, these rules share a common denominator: a definition of the word "parent" to include men who are not in fact natural or adoptive parents, who have no legal responsibility to support the children in the family, and who have not in fact assumed the responsibility to give support. Some rules require that such a man live in the home, either as a stepfather or otherwise; others require only that there be some kind of social or sexual relationship between the man and the mother of the children; and still others, in addition to one or both of the above, refuse benefits if the man has assumed an undefined "father-role" towards the children. It is of the utmost importance to all needy children that this Court clarify the status of all forms of substitute-father rules.

II

Regulations, such as Alabama's and other states', that define "parent" for ADC eligibility to include persons who do not have a legal duty to support children in a family are in conflict with the intent and purpose of Title IV of the Social Security Act. Under the Act children who are the intended beneficiaries of its provisions are entitled to its benefits. No such eligible persons may be excluded from those benefits by the states through conditions at variance with the statute's purpose. It is clear from legislative history, the context of the Act, and the interpretation given it by HEW that all needy children who are deprived of the financial support of their natural or adoptive parent or a stepparent legally responsible for financial support were intended to be eligible for benefits. Thus, all state rules which define as "parents" persons who are not so

legally responsible and deny aid on that basis violate the Act because they bear no rational relation to financial need or deprivation of parental support.

III

The Alabama regulation, as well as others that similarly define "parent," violates the Equal Protection Clause of the Fourteenth Amendment on two tests. First, such a definition bears no reasonable relation to the purpose of Title IV of the Social Security Act or any permissible state use of the ADC program. None of the rationales which can be offered in support of the rule are sufficient to justify it in light of the Act's clear purpose. Second, in light of the situation of the appellees and their class, needy children who are otherwise helpless and wholly without the means to live, special scrutiny should be given to the classifications created by substitute-father rules. This case presents a unique opportunity for this Court to provide guidance which will guarantee these children the protection intended by Congress.

ARGUMENT

It Is of Utmost Importance That This Court Hold in This Case That the Social Security Act and the Equal Protection Clause Prohibit State Rules Which Deny ADC to Needy Children by Defining as a "Parent" Any Person Not Legally Obligated to Support Those Children.

I.

The Alabama Substitute-Father Rule at Issue Here Is Only One of Many Forms of Substitute-Father Rule. A Variety of Other Definitions of "Parent," All Unrelated to Legal Responsibility for Financial Support, Are in Force in Many States and Have Been Employed by Alabama.

The question which underlies the primary statutory and equal protection arguments in this case is: who are the "parent[s]" (or, more particularly, the fathers) referred to in §406(a) of Title IV of the Social Security Act (42 U.S.C. §606(a)), whose death, absence or incapacity entitles needy children to Aid to Dependent Children benefits?

We show in Point II that Congress intended the term "parent" to mean only a natural or adoptive father, or a stepfather who is under a legal duty to support the children. Not only is such a definition the one clearly intended by Congress; any other definition frustrates the purpose of the ADC program and, as shown in Point III, results in an unjustifiable classification excluding from ADC benefits needy children who in fact are deprived of their fathers' support. We think it appropriate at this initial point in the Brief to review the varied and conflicting definitions of "father" used in a substantial minority of juris-

dictions in this country, particularly since during the course of this litigation the Appellant Alabama welfare officials have employed a number of these definitions. Such a review is of critical importance in this case so that this court may undertake its deliberations cognizant of the subtle variations which can be incorporated into the substitute-father rule.

The court below considered "economic factors" and not moral conduct or sexual relationships fundamental to proper definition of "parent" under Title IV. 277 F. Supp. 31, 39. Appellant Alabama argues, however, that its substitute-father regulation, looking towards sexual relationships with the mother as the definitive element of fatherhood, is not based upon moral judgments but "is a method of utilizing economic resources available" from substitute-fathers. Appellant's Brief, p. 11. Appellees stress that, under the Alabama regulation, the substitute-father need have no relationship to the children, need not live in the house or aid or guide the children in any way—or even know the children. The United States, in an "amicus letter" to the court below, sought to distinguish between a "suitable home" rule, which looks to the moral behavior of the mother, and a "true" substitute-father rule, wherein the man has some sort of undefined relation with the children.[1]

Subsequent to the decision of the court below, Appellants have successively adopted two different definitions of "father." See Appendix B, *infra*, pp. 7a-8a. The rule first adopted by Alabama would define a "substitute father" as an unrelated male who is living in the house and acts as a father to the children in an unspecified way, regardless of whether that person is legally bound to support the children. Under the other, more recent Alabama rule

[1] Exhibit K, appended to Appellants' Brief in this Court.

a man not legally married to the mother is not treated as a substitute father; the regulation does, however, disqualify children if they acquire a stepfather, even though such a stepfather owes the children no duty of support, may not contribute to their support, and may not be financially able to so contribute.

The dispute over what constitutes fatherhood within the meaning of Title IV is by no means confined to Alabama. Some states have adopted rules essentially similar to that of Alabama. A number of states deem the critical element to be whether the unrelated male is physically present within the home. Other states reject the latter element as critical and hold that the "kindness" or other non-economic manifestations of fatherhood may be determinative. Still other states require both presence in the home and some unspecified, undefined (except by the individual welfare worker) incident of fatherhood to be exhibited. Finally, several states make a legal marriage dispositive of the "substitute-father" question despite the fact that the marriage does not render the stepparent liable for support in most of these jurisdictions.

Whatever the variations in scope and language, these "substitute-father" rules have one crucial common characteristic. Each denies essential financial assistance to needy children only because of a man who is under no legal obligation to provide financial support for those children. The text of the relevant rules is attached to this Brief in Appendix C. Appendix D indicates which states treat a stepfather as a parent for purposes of ADC but do not require him to support his stepchildren. Below, we briefly review the principal variants of substitute-father rules in addition to those adopted by Alabama. We should perhaps emphasize that the substitute-father rules to which *amici* refer do not exist in the majority of juris-

dictions. Most states define "father," for purposes of ADC eligibility as do *amici:* as a natural or adoptive father or a stepfather who has a legal duty of support.

Arkansas, Georgia and Louisiana: "Father" is a man who has a sexual relationship with the mother, whether he is living in the home or not.

Arkansas, Georgia and Louisiana, like Alabama, make the sexual relationship between the mother and an unrelated man the critical element in determining whether the children are deprived of their father's support due to death or absence from the home. The concern in Arkansas is with whether the mother affords "the privileges of a husband" to a man. Evidence of such a relationship includes whether there have been "frequent visits" by the man to the house of the mother or "frequent appearances of the man and mother together in public." (The full text of this rule is set out in Appendix C, pp. 11a-12a.) In Georgia, a "substitute father" may be a man, "married or single . . . [who] visits frequently for the purpose of living or cohabiting with the applicant." (App. C, pp. 15a-16a.) Practice under the Georgia rule is illustrated by the following case description from an HEW report:

> An application was rejected for the third time in three months because the mother "had not proved there is no substitute father." Proof of the death of the father of two children had been secured. The mother brought a receipt showing that she had filed a warrant against the father of the other child. A medical statement showed that she was not able to work. According to the record, a man whom she said was a roomer lived in the home and paid $4 a week room rent. Prior to the last rejection, the mother stated that this former roomer had moved. No efforts were made to secure proof that he was actually gone or to tell the appli-

> cant how she could prove this in order to clear her eligibility. Several letters from the mother indicated that the family was in serious need, and that a very sick child required hospitalization. No response was recorded.[2]

Louisiana, using the term "nonlegal marital union" in lieu of "substitute parent," presumes that a "nonlegal union" exists (and hence denies aid), *inter alia,* if:

> a man who is legally married and living with his legal family is visiting an ADC mother in her home or meeting her elsewhere. . . . (*Id.,* p. 24a; full text at 19a-27a.)

Recently, preliminary injunctions against both the Georgia and Louisiana substitute-father regulations have been issued by three-judge Federal Courts. *Roussaw* v. *Burson* (M.D., Georgia, C.A. No. 2323 (March 22, 1968)); *Griffin* v. *Bonin* (W.D. La., C.A. No. 13,521 (March 21, 1968)). These cases await the outcome of this appeal.

Indiana and Mississippi: A "substitute father" is a man who performs a "father-role" to the children; no definition of "father-role" is offered.

Indiana's substitute-father rule is concerned with unrelated males with regard to whom "there is reason to believe this man is living in the home with the mother and the children, *partially* assuming the role of husband and father." (*Id.,* pp. 16a-18a.) (Emphasis added.) No further clues are offered as to what this partial assumption of the role might be. Mississippi's rule, in contrast, does

---

[2] HEW, Social Security Administration, Bureau of Public Assistance, "Report of Administrative Review Findings on the Application Process for Georgia" (1957), quoted in Bell, AID TO DEPENDENT CHILDREN 90 (1965).

not require a "father role" when the unrelated man lives in the home, but does require "the father role" when the unrelated man does not live in the home. Like Indiana, Mississippi gives little indication as to what "the father-role" is. (*Id.*, p. 29a.)

District of Columbia: Guides to the "father-role."

In the District of Columbia, a sexual relationship with the mother is not enough to dub a man the substitute father. In the home or out, the question is whether his "relationship to the family is that of husband and father." (*Id.*, pp. 12a-15a.) In determining this question, the D.C. rule offers guidance to the welfare worker in the form of "some facts to be considered in determining that the man (not living in the home) has a relationship with the children similar to that of father and child." These facts include whether the man:

> Visits the home to see the children; . . . Donates gifts to the children; . . . Is the father figure in the home; . . . Acts "at home" with the children by dressing, feeding, carrying or fondling them; . . . Takes the children on walks, excursions and the like; . . . Shows concern about the health of the children and uses health facilities in the community to restore the health of the children; . . . Shows interest in the educational progress of the children. . . . (*Id.*, p. 14a.)

Texas: The man must be present in the home, but the burden of proof rests with the mother.

Texas includes as a father any man "with whom the mother . . . is maintaining a marital relationship or maintaining a home together." (App. C, p. 35a.) However, as in Alabama and other states, if there have been "contin-

uing pregnancies" or allegations that the mother has been "cohabiting with a man", the mother must establish the absence of a substitute father. (*Id.*, p. 36a.) Until the recent decision in *Rios* v. *Hackney* (N.D. Tex. C.A. No. 3-1852, Nov. 30, 1967), a mother accused of cohabitation could not even confront her accuser at an administrative "fair hearing".

Michigan and New Hampshire: Extramarital Sexual Relations Disqualify; Legalization by Marriage Leads to Conflicting Treatment.

Michigan's rule requires an ADC mother, who has "a continuing relationship" with a "partner . . . exercising the role of parent to the children or the rights of a spouse to the client," to marry the "partner" in 30 days or lose aid. (App. C, pp. 27a-28a.) If she marries, she may then be eligible for aid even though a stepparent is in the home. If there is legal impediment to marriage, the client (or partner) must institute legal action in 6 months.

New Hampshire's rule states: ". . . an unrelated male is not permitted to live with an ADC family, whether in their home or his." (*Id.*, p. 30a.) With refreshing candor, this rule concedes it is based on concern for "moral well-being" and "community criticism and censure." (*Id.*, p. 31a.) In contrast to Michigan, however, in New Hampshire if the unrelated male marries the woman, ADC eligibility is denied on the ground that a stepfather is present.[3]

---

[3] This was stated unequivocably by George E. Murphy, Director, Division of Welfare, New Hampshire Department of Health and Welfare, in a letter to *amicus* Center, Nov. 30, 1967. According to the same letter, New Hampshire law holds a stepfather responsible for support only of "the children for whom he has assumed a parental relationship."

New Mexico and Pennsylvania: Conflicting rules on whether an unrelated man living in the home is a "substitute father" and on whether a stepparent is such a "father."

New Mexico defines as a father the natural father and "any man living with the mother and child with the *exclusion of the step-father*" of the child. (*Id.*, p. 32a.) (Emphasis in the original.) Pennsylvania, on the other hand, does not define an unrelated male in the house as a father for purposes of eligibility, but it disqualifies children with stepfathers even though no support duty is imposed upon stepfathers by the mere fact of marriage and living in the home. (See, App. D, p. 41a.)

The conflict and variety of the substitute-father rules resist sensible analysis. North Carolina, for example, finds needy children ineligible for ADC if an unrelated man lives in the home and one of the children is illegitimate. If all of the children are legitimate, however, they are eligible despite the presence of the man. (App. C, p. 32a-33a.) Other substitute-father rules, some of which are equally difficult to understand, are set out in Appendix C.

Whatever may be the bizarre intricacies of each substitute-father rule, they all share one common characteristic crucial in *amici's* view: The "substitute father" may be someone other than a natural or adoptive father or a stepfather who has a legal duty to support the children, or who has in fact accepted full responsibility for their support. In the remainder of this Brief, *amici* seek to demonstrate that this characteristic places all such rules in conflict with the Social Security Act and the Equal Protection Clause.

II.

Any Definition of "Parent" for Purposes of ADC Eligibility Which Is Not Limited to Persons Under a Legal Duty to Provide Financial Support Conflicts With the Purposes of Title IV of the Social Security Act.

A. *Title IV Creates a Right to Aid for All Eligible Children and Prohibits Eligibility Requirements Not Reasonably Related to the Purpose of the Title.*

Title IV of the Social Security Act authorizes federal financial assistance only to those state programs of Aid to Dependent Children which fit the definitions and meet the conditions there set forth. Several of these provisions create a "statutory entitlement" (to use the term of the court below, 277 F. Supp. at 34 and 38) or, in other words, a right of eligible persons to receive assistance.

The Social Security Act, Section 402(a)(10), 42 U.S.C. §602(a)(10),[4] requires that:

> . . . aid to families with dependent children *shall be furnished* with reasonable promptness to all eligible individuals: . . . (Emphasis added.)

This statutory command creates not simply a duty for welfare agencies to grant assistance to all eligible individuals, but a correlative *right* of such individuals to receive aid. Thus, the United States Department of Health, Education, and Welfare (HEW) has stated that this provision:

> removes from the discretion of the [state or local] administration the right to exclude persons falling within the scope of the program, because all persons

[4] This section was numbered as §402(a)(9), 42 U.S.C. 602(a)(9), prior to the enactment of the 1967 Amendments to Title IV.

> meeting the eligibility qualifications are equal before the law and have a right to receive assistance under a uniform application of law. The right of eligible persons to receive assistance is also inherent in [other] requirements of the Social Security Act.[5]

Among the other requirements of the Act which establish the right of eligible claimants to public assistance is the requirement that a "fair hearing [be granted] to any individual whose claim for aid . . . . is denied or not acted upon with reasonable promptness." Social Security Act, §402(a)(4), 42 USCA §602(a)(4). In such a hearing the welfare department must establish that the applicant's exclusion is not arbitrary. "Fair hearing" itself implies a requirement of fair results. See, *Morgan* v. *United States*, 298 U.S. 468; *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426.

Further, not only must all eligible persons receive benefits, but the federally supported state program must guarantee that "the benefits of the program be equally available to all eligible persons," so that eligible persons in like circumstances of need receive equal amounts of benefits. HEW, Handbook of Public Assistance Administration, Pt. II, §4300 (1962). The Act also requires that,

---

[5] This statement appeared in HEW's Handbook of Public Assistance Administration, Pt. IV, §2321, as an explanation of the federal statutory and administrative requirements designed to protect the right of eligible persons to receive assistance. This Handbook, which will be cited throughout the Brief, is provided to state welfare agencies as "the official medium for issuance of interpretations and instructions concerning requirements of the public assistance Titles of the Social Security Act" (Introduction, p. i.). In February 1968, HEW revised the Handbook for purposes of publication in the Federal Register. While explanatory language such as that quoted above was deleted as unnecessary, the administrative requirements to protect the rights of eligible persons were strengthened. Transmittal 139, Handbook of Public Assistance Administration.

except in specially defined circumstances, the benefits given be in the form of "money payments" so as to guarantee that recipients, not welfare agencies, will have the right to determine how the money is best spent. Social Security Act, §406(b), 42 USCA §606(b).[6]

Of course, the right of all eligible persons to receive ADC assistance would be quickly and easily nullified if states could, consistently with the statute, create eligibility conditions at variance with the statutory purpose. For this reason, HEW has long held that state eligibility conditions must be consistent with the statutory purpose, see *Welfare's "Condition X,"* 76 Yale L.J. 1222 (1967), and recently included that requirement in its official regulations:

> A State Plan for OAA, AFDC, AB, APTD, or AABD must provide that: . . . The policies and procedures for taking applications and determining eligibility for assistance or other services will be consistent with program objectives, will respect the rights of individuals under the United States Constitution, the Social Security Act, Title VI of the Civil Rights Act of 1964, and all other relevant provisions of Federal and State Laws, and will not result in practices that violate the individual's privacy or personal dignity, or harrass him, or violate his constitutional rights. HEW, Handbook of Public Assistance Administration, Pt. IV, §2200 (1967).

HEW has applied this requirement to prohibit, *inter alia*, eligibility criteria which exclude illegitimate children,

---

[6] "The provision that assistance shall be in the form of money payments is one of several provisions in the act designed to carry out the basic principle that assistance comes to needy persons as a right. The right carries with it the individual's freedom to manage his own affairs. . . ." HEW, Handbook of Public Assistance Administration, Pt. IV, §5120 (1947).

Indians, or—in the case of the optional program of ADC for families with an unemployed parent (Social Security Act, §407, 42 U.S.C. §607)—children of domestic and agricultural workers.[7] It has also prohibited on this basis state welfare rules which treat recipients differently because of the source of their income and rules which assume income or jobs which are not, in fact, available. HEW's most notable application of the requirement of consistency with the purposes of the Act is its "Flemming Ruling," which prohibited, as bearing "no just relationship to the ADC program," "suitable home" rules that deny ADC to an otherwise eligible child "because of the behavior of his parent or other relative."[8] The amicus letter submitted below on behalf of the United States conceded that the form of the substitute-father eligibility rule used in Alabama conflicts with the purposes of Title IV because it is *de facto* a "suitable home" rule.[9] We will show below that the purposes of Title IV are contravened by *all* forms of substitute-father rule.

B. *Legislative History, Statutory Context, and Administrative Interpretation Make it Clear that Title IV Was Intended to Aid All Needy Children Deprived of the Financial Support of a "Parent" Legally Obligated to Provide that Support.*

Section 406(a) of the Social Security Act and Alabama's implementing legislation are intended to aid "needy dependent children," children "deprived of parental support

---

[7] These and other rulings, as well as the statutory and constitutional basis for this requirement, are set forth in *Welfare's "Condition X," supra.* See also, with regard to the illegitimacy ruling: HEW, *Illegitimacy and Its Impact on the Aid to Dependent Children Program* 54 (1960).

[8] The full text of the Flemming Ruling, as well as related regulatory material, is set forth in the opinion below, 277 F. Supp. at 35-36, and in Appellees' Brief herein.

[9] Appellants' Brief, Exhibit K.

or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent. . . ." [10] "Parent" in this definition refers only to a needy child's natural or adoptive parent or a stepparent legally responsible for the child's financial support, as is made clear in the legislative history and administrative interpretation of Section 406(a) and in the use of the term "parent" elsewhere in Title IV.

1. The Legislative History of Section 406(a) and the Congressional Concern With "Breadwinners."

The legislative history on the meaning of the term "parent" as it is used in Section 406(a) is not lengthy. What does exist, however, is very much to the point. The Committee on Economic Security, which drafted the initial proposal for the Social Security Act, emphasized in its report to the President that its various programs were designed to create safeguards against "loss of earnings." [11] Large numbers of young children were deprived of "a father's support" and needed "financial aid"; special attention had to be given to "the fatherless and other 'young' families without a breadwinner." Fatherless families needed a special program because unemployment compensation, work relief and other public and private job assurance programs for male breadwinners could not help them. Only public aid could replace the lost financial

---

[10] The legislation in Alabama, implementing Title IV of the Social Security Act, states that "dependent child is defined for purposes of ADC in Alabama as it is defined in the Federal Act." Code of Alabama, Title 49, §17(14).

[11] The Committee on Economic Security, consisting of Frances E. Perkins, H. Morgenthau, Jr., Homer Cummings, Henry A. Wallace and Harry Hopkins was created by Executive order of President Roosevelt and charged with drafting recommendations for economic security. President Roosevelt endorsed its recommendations and sent them to Congress in a Message dated January 17, 1935. See H.R. Doc. No. 81, 74th Cong., 1st Sess. (1935).

support of the missing breadwinner. (H.R. Doc. No. 81, 74th Cong., 1st Sess. (1935) pp. 2, 5, 35.)

The initial House version of the Social Security Act reiterated the viewpoint of the Committee on Economic Security. It emphasized that "the core of any social plan must be the child," but did not specifically limit the definition of "dependent child" to those who lacked a parent. H.R. REP. No. 615, 74th Cong., 1st Sess. 9-10, 24 (1935). The Senate Committee on Finance, however, confined the definition to those children deprived of a parent's support or care "because a parent of the children has died, or is continuously away from home, or is unable, due to physical incapacity, to provide such support or care"; the Senate Committee report also stressed that it was the lack of "a breadwinner" in the family which prompted the concern for Title IV.[12] S.REP. No. 628, 74th Cong., 1st

[12] Two relevant observations ought to be made: (1) The Senate Committee, and ultimately Congress, provided separate legislation for families without "breadwinners" because it felt families whose fathers were home would be provided for through other programs: "Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family. These children will be benefited through the work relief program and still more through the revival of private industry. But there are large numbers of children in relief families who will not be benefited through work programs or the revival of industry". S. REP. No. 628, p. 17 (1935). Children whose so-called "fathers" have no legal duty of support and who are not given support by them on a voluntary basis, one might note, would hardly be benefited by a work relief program these "substitute fathers" engaged in. (2) The term "support"—meaning financial aid—was used throughout the legislative history to refer primarily to support from fathers. *Ibid.* A child who was *supported by his mother*, though he lacked "care" from either parent, was also defined as dependent: "Thus if a baby's father were an imbecile, unable even to care for the baby at home, the baby would be a 'dependent child' even though it had a mother who had a job, for the baby would be without normal parental care". *Id.*, 36. The notion was to allow the mother to give her "care" and make up for the lack of the father's support with financial aid. H.R. Doc. No. 81, 74th Cong., 1st Sess. (1935) p. 2. "Care" from an unrelated male friend of the mother, in the form of emotive kindness or interest, minus financial support, was hardly the Congressional concern.

Sess. 36, 17 (1935). Discussion on the floor of Congress also emphasized the need to replace the earnings of a missing "breadwinner". Representative Doughton, in introducing the proposed bill on the floor of the House of Representatives, emphasized the need to aid those families "where there is no breadwinner" so that young mothers could "care" for their children. 79 CONG. REC. 5476, 74th Cong., 1st Sess. (1935).

Could Congress have intended that a person who was not the natural father of the child, lacked any legal duty of support and was not giving support, would fall within the definition of "breadwinner"? Surely not. We submit that the language of §406(a), when read in the context of the underlying legislative history, plainly reveals a purpose to relieve need by making assistance available to children deprived of the financial support of their father. To deprive children of assistance because of the presence of a man who neither owes them a legal duty of support, nor is actually giving support, is clearly inconsistent with the broad and generous purposes underlying Title IV. Whether the man is engaged in sexual relations with their mother, or displaying kindness to or interest in the children, is totally irrelevant to Title IV. We submit that no person should be irrebutably regarded as a parent within the meaning of §406(a) unless there is the assurance of financial support provided by the legal obligations imposed on natural and adoptive parents, and in some states and circumstances, stepparents.

This construction is supported both by common usage and administrative practice. The centrality of financial support to the notion of a "breadwinner," so important in the legislative history, is made plain in WEBSTER'S: a "breadwinner" is "a person who supports his dependents by his earnings." (WEBSTER, NEW WORLD DICTIONARY (College Ed.

1956). Likewise, BLACK, LAW DICTIONARY (4th ed., 1957) defines parent as "the lawful father or mother of a person [or] one who procreates, begets or brings forth offspring," that is, a person bound to support the child.

This is why the United States Department of Health, Education and Welfare, in enumerating the children who have been "deprived of parental support or care" as intended by Congress, has included a child living with his natural mother and his stepfather where the latter has no legal duty of support. Thus, HEW has stated with regard to stepparents:

> "A child living in the home of a stepparent who is not required by State law to assume a parental role, may be included [in the ADC program] on the ground that he lacks the support or care of the natural parent who is dead or absent. In the absence of legal obligation to assume a parental role, a stepparent is no more of a 'parent' than any other person acting in loco parentis. *In these situations, the only safeguard to the child's right to assistance is his eligibility under the condition of being deprived of the support or care of the natural parent.* In States in which the stepparent is required to assume a parental role, a child may be deprived of support or care if the stepparent is dead, absent or incapacitated." HEW, Handbook of Public Assistance Administration, Pt. IV, §3412 (1946) (set out in full in App. A, *infra*, pp. 1a-3a.)
>
> (Emphasis added.)

In discussing stepparents, HEW properly distinguishes between those stepparents who are required to support the children and those who are not. Its discussion of adoptive parents—recognizing that upon adoption it is the adoptive and not the natural parent who bears legal

responsibility for support—makes the same distinction: death, absence or incapacity of the natural parent does not qualify the child as "deprived of parental support"; death, absence or incapacity of the adoptive parent does. The legal obligation of support is the key.

As we shall show below, HEW has been even more clear in setting forth the intended meaning for "parent" in the closely related Section 406(b). Initially, however, we consider below the implications of Section 402(a)(11),[13] which also uses the term "parent".

2. The Meaning of the Word "Parent" as It Is Used Elsewhere in Title IV of the Social Security Act.

It is a standard and sensible rule of statutory construction that words and terms used within the same statute (and same subchapter of a statute) will be construed as having the same meaning unless a contrary intent is clearly indicated by the legislature. The word "parent" is used in sections of Title IV other than §406(a) in a manner which can only denote a parent with the legal duty of support.

Section 402(a)(11), requires that a state plan must:

> effective July 1, 1952, provide for prompt notice to appropriate law enforcement officials of the furnishing of aid to families with dependent children in respect of a child who has been deserted or abandoned by a parent.

Obviously, Congress did not intend that a "parent" who has no legal duties of support be referred to law enforcement officials, for the very purpose of such referrals is

---

[13] Formerly §402(a)(10), prior to the 1967 amendments to the Social Security Act.

to institute non-support proceedings. See, HEW, Handbook of Public Assistance Administration, Pt. IV, §§8100-8149 (1952).

Section 402(a)(11), aside from being in the same title as Section 406(a), has an intimate relationship with Section 406(a). The "parent" who makes a child eligible for ADC by depriving him of parental support due to desertion or abandonment under §406(a) is surely the *same* parent who is to be reported to appropriate law enforcement officials for desertion or abandonment under §402(a)(11). These are, of course, in both instances, parents who are legally responsible to the child.[14] But, under the various substitute-parent policies, *none* of the "substitute parents" who desert their "children" are reported because, of course, they are not legally responsible for child support at all. Nor is there any state which reports "step-

---

[14] Alabama's criminal statutes, as well as its civil law, requires "fathers" to support their "children". Stepfathers who are not the legal custodians of the child, and unrelated males regardless of their sexual activities, are not "fathers" required to give support under such statutes. Code of Ala., Title 34, §§89-90. Stepfathers who have not taken the stepchildren into their home, treated them as members of their own families and demonstrated an intent to voluntarily assume the relation of "a parent", have no civil support obligations. *Englehardt* v. *Yung's Heirs*, 76 Ala. 534 (1884); *Chandler* v. *Whatley*, 238 Ala. 206, 189 So. 751 (1939); *Nicholas* v. *State*, 32 Ala. App. 574, 28 So.2d 422 (1946). Obviously unrelated males have no civil support obligations of a parent. See App. D for other states.

It is also noteworthy that the only "parent" from whose estate a child can inherit under the law of intestate succession and for whose wrongful death he can recover damages is his natural or adoptive parent. On intestate succession see *Williams* v. *Witherspoon*, 171 Ala. 559, 55 So. 132 (1911); *Franklin* v. *White*, 263 Ala. 223, 82 So.2d 247 (1955); Code of Ala., Tit. 27, §§5, 6; Atkinson, HANDBOOK OF THE LAW OF WILLS §18 (2d ed. 1953). On recovery for wrongful death see: Code of Alabama, Tit. 7, §123; Speiser, RECOVERY FOR WRONGFUL DEATH §10:8 (1967). Also, a stepchild can recover workman's compensation benefits only if he was actually dependent upon his stepfather for support. Code of Alabama, Tit. 26 §262 (b); 2 Larson, *Workman's Compensation* §63 (1961).

fathers" to the "appropriate law officials" except where those stepfathers are legally responsible for support.[15]

Also intimately related to Section 406(a) is Section 406(b), which authorizes federal matching for money payments to, *inter alia*:

> . . . the relative with whom any dependent child is living (and the spouse of such relative if living with him *and if such relative is the child's parent* and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under Section 407 of this Title. . .). (Emphasis added.)

In other words, if a child is eligible for ADC because one parent is dead, incapacitated, absent from the home or unemployed, and the child is living with the other parent, the federal government will match money payments not only for the needs of the child and the parent he is living with, but also for the spouse of the "parent" he is living with. HEW has formally interpreted the term "parent" as used in this section as meaning only "the natural or adoptive parent," and "spouse" as meaning only "the legal spouse." HEW, Handbook of Public Assistance Administration, Pt. V, §3320 (1963).[16]

---

[15] HEW directs states to give notice regarding only those persons "who, under state laws, are defined as parents . . . for the support of minor children. . . ." HEW, Handbook of Public Assistance Administration, Pt. IV, §8131(2) (1952). Appellant Alabama's own welfare regulations state: "Report parents who are legally responsible under Alabama law. These are the *natural* or *adoptive* parents of a child. A natural parent includes the father of a child born out of wedlock, if paternity has been *legally* established. It does not apply to a stepparent." Ala. Manual of Public Asst. Adm., Pt. I, Ch. II, p. 36. (Emphasis in original.)

[16] The relevant portion of Section 3320 reads:

> In AFDC, the recipient count for a family may include all eligible children, plus the eligible relative with whom such children are living. Effective October 1, 1962, when at least one of the children in

Thus, the federal agency charged with the duty of administering Title IV has in §§406(b) and 402(a)(11), both closely related to §406(a), adopted a construction of parent which is limited to persons owing a legally enforceable duty of support to the child in question. This is also the only definition of parent consistent with common usage and legislative history. It is, without doubt, the meaning of "parent" under §406(a). The only "parental support" a child need be denied to be within the purpose of Title IV is the support of a true parent, one who caused his birth, legally adopted him, or is otherwise legally responsible for his support.

C. *The Purpose of Title IV is Contravened by ADC Eligibility Rules which Treat as a "Parent" Persons Not Legally Responsible for Financial Support.*

The purpose of Aid to Dependent Children programs is to provide financial assistance for children who are needy and deprived of the financial support of a parent legally responsible to provide that support. By its very nature, however, a substitute-father rule ignores both financial need and parental support.

---

a family is eligible due to the unemployment or incapacity of his own parent in the home, the recipient count may include all eligible children and two eligible relatives with whom the children are living, if their needs were included and they are married to each other. *In the context of deprivation by reason of incapacity or unemployment, the term "parent" means the natural or adoptive parent. A step-parent can be counted as the second eligible adult recipient only when he is the legal spouse of the child's own parent.* (Emphasis added.)

The full text of the regulation is set out in Appendix A, p. 4a.

It should be noted that the construction of parent accepted by HEW for purposes of §406(b) is in one respect even narrower than the construction argued for by *amici* in that it does not include stepparents even where these are liable for support. For present purposes we may pass the validity of this limitation, it being important only that such federal administrative construction provides no basis for a definition which includes persons not legally obligated to support.

Children who are excluded from aid under a substitute-father rule are at least as needy as those who are not excluded. If a child were not in financial need after consideration of all his available resources, including contributions from the substitute father (if any), he would be ineligible without regard to the substitute-father rule, and we do not contend otherwise. Appellants' Brief seriously confuses the eligibility issue of "need" with the eligibility issue of "deprivation of parental support." It is in connection with this confusion, that appellants misuse and misinterpret Lewis and Levy, *Family Law and Welfare Policies: The Case for 'Dual Systems'*, 54 Calif. L. Rev. 748 (1966). Lewis and Levy do *not* argue that stepfathers and "unrelated men in the house" should be defined as "parents" so as to render needy children ineligible for ADC on the ground that they are not "deprived of parent support." Their argument is that the *income* of stepfathers and unrelated "marital" partners in the house should be considered in determining "need," on the inference that such income will, in part, be made available to the children.[17] But a State's authority to consider all

[17] HEW has prohibited even this inference by ruling that state welfare agencies, for purposes of determining "need," may not assume receipt of income that is not actually available to the children. "Effective July 1, 1967, . . . the State plan must provide that only income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment." HEW, Handbook of Public Assistance Administration, Pt. IV, §3131(7). Partly upon the basis of this regulation, a federal court suit was instituted in 1967 seeking a declaration that California welfare regulations which computed income of stepfathers and "men in the house" regardless of the availability of such income to the family, contravened the Social Security Act. Thereafter California amended its regulations to declare that "to be considered in determining the AFDC aid payment, income must, in fact, be currently available to needy members of the family in meeting their needs during the budget period." Public Social Service Manual, §44-101, item 17. On the basis of this change, the case was declared moot. *McPherson* v. *California*, N.D. Cal., C.A. No. 46759 (June 29, 1967).

The constitutional basis for prohibiting assumed receipt of income is set forth in *Welfare's "Condition X," supra* at 1231. That Note con-

money a child actually receives from his "substitute father," in order to determine whether that child has financial need, is in no way at issue here. The difference in outcome between such consideration of *income* and "substitute-father" rules which bar eligibility because of "parental" *presence* is significant. Under the first rule, a stepfather or other man with no income would not affect eligibility at all; and children with a stepfather with less income than the family needs to meet the welfare agency's minimum financial standards for such a family would still be eligible for supplementary ADC grants.

No one disputes the desperate financial need of the thousands of children denied aid under the various substitute-father rules. These children also are no less deprived of parental support than children who remain eligible under substitute-father rules. Their actual father, the man legally obligated to support them, is dead or has deserted. In his place the substitute-father regulations have introduced a new type of father—the "substitute father." The relevant attribute of this "substitute father" is that he does not have any legally imposed or voluntarily assumed duties and responsibilities to the children. He has not adopted the children. He does not have custody of them. He is not required under law to support

---

cludes, on the basis of the due process test set forth in *Mobile, J. & K.C. R. Co.* v. *Turnipseed*, 219 U.S. 35, and *Heiner* v. *Donnan*, 285 U.S. 312, that:

> The substitute father rule . . . violates due process for two reasons. First, it creates an arbitrary presumption; there is no *a priori* reason to assume that a man acting as surrogate husband must also be acting as surrogate father to children he has no legal duty to support. . . . Second, even if experience shows that the presumption is not arbitrary, it still fails because the applicant may not disprove the dispositive fact presumed in her case; although the mother might establish non-support of her children, she still loses her AFDC payments because she is permitted to rebut only the fact of illegal relationship and nothing more. Note, *Welfare's "Condition X,"* 76 Yale L.J. 1222, 1231 (1967).

them. And the regulations call for no evidence that he has voluntarily assumed the legal support responsibilities of a true parent.[18] No rule which denies essential financial assistance only because of such a man can be consistent with the purposes of Title IV.

III.

Any Definition of "Parent" for Purposes of ADC Eligibility Which Is Not Limited to Persons Under a Legal Duty to Provide Financial Support Violates the Equal Protection Clause.

A. *Definitions of Parent Which Include Persons Not Under a Duty of Legal Support so as to Deprive Children of Needed Aid Are Void Under the Ordinary Principles of Equal Protection Because Such Definitions Bear No Rational Relation to the Purpose of Title IV or Any Other Permissible State Use of the ADC Program.*

To survive a challenge based upon the equal protection clause of the Fourteenth Amendment, the distinctions implicit in the Alabama substitute-father regulation, and its counterparts, must, at a minimum, bear some relation to the purpose of the enabling legislation or to some other constitutionally permissible governmental purpose. As has been earlier stated, the central purpose of Title IV of the Social Security Act is to grant financial assistance to needy children deprived of their father's support. By denying assistance to children merely because their mother may have engaged in sexual relations with some man, the Alabama regulation excludes a class of children no less

---

[18] An irrebuttable presumption that the substitute father has assumed support responsibilities, so that he would support the children if he had income, would be no different from the presumption of receipt of income which HEW has expressly prohibited. See note 17, *supra*.

deprived of parental support than those aided. Similarly, kindred regulations which seize upon the mere presence of a man in a household, or a display of transient kindness, or even the marriage of the man to a child's mother, to deny assistance create discriminations inconsistent with the purposes underlying Title IV. Only where a person has a legally enforcible duty to support a child can he be properly regarded as the child's parent, for only in these cases can it be generally assumed that the child enjoys prospects of parental support sufficient to differentiate him from the class of beneficiaries contemplated under Title IV.

The distinctions involved in the various substitute-father rules thus find no support in the purposes underlying Title IV. Under the test set forth in *Gulf, Colorado, and Santa Fe Ry. Co.* v. *Ellis,* 165 U.S. 150, and frequently followed thereafter, this lack of "a difference which bears a reasonable and just relation to the act in respect to which the classification is proposed" (165 U.S. at 155) alone renders the substitute-father eligibility rules violative of the Equal Protection Clause. Subsequently we will show that the stronger test of close or special scrutiny is called for here. We wish first to demonstrate that the substitute-father rules cannot meet even the minimal test of equal protection appropriate to cases involving economic regulation, for the distinctions created by these rules cannot be justified by reference to the purpose underlying Title IV, or indeed to any other constitutionally permissible government purpose.

The court below viewed Alabama's substitute-father rule as one based on moral condemnation of the sexual behavior of the mother. Such a judgment, the court decided, is not a reasonable basis for depriving needy children of the financial aid intended for them by the Act. 277 F. Supp. at 39-40. Seeking to avoid the impact of this ruling, Alabama repeatedly argues to this court that the regulation is *not*

based on "moral judgments relating to the sexual behavior of the poor . . . ." (See, *e.g.*, Appellant's Brief, p. 11.) Rather, Alabama claims that: (1) the regulation serves "to shift more of the burden of supporting these [illegitimate] children on the individuals who are responsible for their procreation . . ." (Appellant's Brief, Ex. J, pp. 108-109), and implicitly, that illegitimate births are thereby deterred; (2) a man who "has the privileges of a husband" (sexual intercourse) *should* assume responsibility for the support of the woman's children (Appellant's Brief, p. 11); (3) a state has an interest in "not giving a monetary advantage to people in illicit relationships which can have the effect of deterring marriage" (Appellant's Brief, p. 14); and (4) a "substitute-father" regulation allows more money to be available for the children who do not have their aid terminated because of it (Appellant's Brief, pp. 14 and 17). These, to the knowledge of *amici*, are the only objectives apart from the purpose of Title IV which have been advanced to justify substitute-father eligibility rules. We consider each below.

The argument that a substitute-father regulation shifts the burden of support of the children in question to those responsible for their procreation is so plainly fallacious that little comment is needed. Such a regulation enforces financial responsibility on no one. It merely deprives children of support, and it does so without inquiry into the substitute father's capacity to support the children or the many other factors which bear on the likelihood that such denial will induce "voluntary" contribution by the substitute parent. What is more, the person whom Alabama is allegedly "holding responsible" by this deprivation is held responsible for children whom he did *not* procreate. The men who are responsible for the procreation of children, legitimate or illegitimate, are held responsible for their sup-

port without regard to the substitute-parent regulation.[19] If on the other hand, one not so responsible wishes voluntarily to contribute to the support of a child, his support will reduce the child's need. Consideration of such contributions in determining the child's need is appropriate and indeed required under Title IV. 42 U.S.C. §602(a)(7). (See pp. 24-25 *supra*.)

Nor has Alabama introduced any evidence in support of its contention that the substitute-parent rule impedes the occurrence of illegitimate births in any way. What little evidence is available on the question—that yielded by a 1957 study of the Mississippi Children's Code Commission[20] —offers no support for Alabama's position. The only conclusion to emerge from that study is that removal from welfare rolls does not reduce the incidence of illegitimacy among the families terminated, hardly a conclusion which can be adduced in support of Alabama's position.

Moreover, even if one were to admit that some discouragement of illegitimacy is likely to result from the substitute-father regulation, such discouragement would not constitute a constitutionally permissible state interest, because the means utilized to achieve that end—termination of aid to existing children—conflicts with the purposes underlying Title IV.[21] As alternative means exist for the discouragement of illegitimacy, there is no justification for state adoption of a device which so plainly frustrates the central purpose underlying Title IV. Indeed, Congress, well aware of the rising incidence of illegitimate births, has now re-

---

[19] See, e.g., the Alabama Support and Desertion Laws, Code of Ala., Title 34, §§89-104, and the Alabama Paternity Statutes, *Id.*, Title 27, §§12(1)-12(9).

[20] Reported in Bell, AID TO DEPENDENT CHILDREN 101-105 (1965).

[21] This is one of the conclusions of HEW's "Flemming Ruling" discussed *supra* p. 15.

quired state welfare agencies to offer, on a voluntary basis, family planning services to all appropriate persons. 1967 amendments to Title IV; Social Security Act, §402(a)(15)(B) and (C), 42 USC §602(a)(15)(B) and (C). Thus, we have in addition to the frustration of purpose which clearly results from Alabama's technique for the control of illegitimacy, an express Congressional judgment on an alternative means not involving such frustration.[22]

Even apart from this conflict with the purposes underlying Title IV, the State of Alabama has no constitutionally permissible interest in imposing sanctions to deter sexual activity where such sanctions are applied only to the poor. Clearly, a statute which purported to punish criminally sexual activity of the indigent alone would deny equal protection. It is of no consequence that the statute here involved does not discriminate between the rich and the poor on its face. Applicable only to the needy, the burdens of ineligibility are visited only upon the poor.[23] Cf. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663. Nor is it a defense that such sexual activity may be the subject of criminal penalties of general application. In *McLaughlin* v. *Florida*, 379 U.S. 184, this Court held unconstitutional a statute imposing criminal penalties for interracial fornication even though there existed another criminal statute of general applicability prohibiting fornication. We submit

---

[22] Moreover, to the extent that Alabama's disqualification of families in which illegitimate births are likely to occur is based on the unspoken assumption that such families constitute undesirable domestic environments, this assumption is belied by appellant's own analysis of the characteristics of such homes. See, Appellants' Brief, pp. 31-34, discussing "A Demonstration Project—Strengthening Family Life for ADC Children Living in Homes Where Conditions Were Considered Unsuitable," reprinted in the Appendix to Appellant's Brief at 587.

[23] It is also worthy of note that, as anticipated, the consequences of implementation of Alabama's substitute-father policy fell much more heavily on negroes than whites. See Appellee's Brief.

that just as the state may not impose additional penalties to deter interracial sexual activities, so also may it not impose additional sanctions to deter like activities merely because the persons engaging in them are indigent. Further pointing up the discriminatory character of this additional deterrent is the fact that the ADC program, which is conditioned upon need, stands alone among governmental transfer programs in imposing such sanctions on those engaging in disfavored sexual activities. All of the programs under which disbursements are made without reference to the applicant's actual need, such as Social Security old age pensions, workmen's compensation, and unemployment insurance, are free of such conditions.

Closely related to the above arguments is Alabama's assertion that a man enjoying "the privileges of a husband" should assume the responsibilities of supporting her children. To this, the short answer is again that the substitute-father rules do not impose responsibility of support; they deprive children of aid. If a State wishes to impose financial responsibilities for child support on those enjoying such privileges, the means are readily at hand.

We next address ourselves to Alabama's contention that its definition of father is necessary to avoid placing "a premium on illicit relationships." By this, Alabama apparently means that without its definition ADC will encourage illicit relationships by supporting such unions while being unavailable to those entering into regular marital relations. This position is clearly founded on erroneous premises, for Alabama, like most states, does not impose a legal duty upon stepparents to support stepchildren unless they voluntarily assume that duty. Consequently, adherence to the federally contemplated definition of parent as a man in loco parentis with the legal duty of support would make ADC available even though a marriage is contracted.

A man and woman whether living together or not—and who are *not* legally married—who beget offspring, *are* the mother and father of those children. So long as that man is in the home, there is no eligibility for ADC because there is a man—the father—who has the legal duty of supporting the children. On the other hand, merely because the mother and a man *not* the natural father of the children marry, there does not arise—under Alabama law and that of most jurisdictions—an obligation on the part of this man to support the children. Marriage, thus, does not make this man the "father" of the children for purposes of ADC because such a support duty is lacking. This is why HEW has informed the states (Handbook of Public Assistance Administration Pt. IV, § 3412):

> In the absence of legal obligation to assume a parental role, a stepparent is no more of a "parent" than any other person acting in loco parentis. *In these situations, the only safeguard to the child's right to assistance is his eligibility under the condition of being deprived of the support or care of the natural parent.* (Emphasis added.) (Full text set out in Appendix A, p. 3a.)

The plain fact is that it is Alabama's arbitrary definitions of "father," and the kindred definitions employed by other states, which deter marriage. It is quite natural for a mother, whose husband is dead or has deserted her, to seek new male relations with a view towards marriage. However, under the substitute-father rule, whenever "there appears to be" a man who is visiting her for the purpose of sexual relations, the mother has the burden of proving that she is *not* having sexual relations. Therefore, the knowledgeable ADC mother will fear the establishment of an open friendship with a male. The rule thus inhibits

those initial contacts which may develop into stable marital unions. Moreover, if the friendship progresses so that the mother thinks of marriage with the man, she will again be deterred because the rule operates to terminate ADC assistance when the marital union is contracted even though her new husband may not be willing or able to assume support duties, and no legal duty of support by him exists.

Indeed, the reason why an Alabama stepfather, by the mere fact of marriage to the mother, does not have a legal duty to support her children is that Alabama public policy has sought to encourage such marriages and not deter them through such support liability. The Supreme Court of Alabama long ago declared that there is no duty of support unless the stepfather voluntarily assumes it. The court also declared:

> . . . such intention [to assume support responsibility] should not be slightly or hastily inferred, and from such circumstances as to operate to deter stepfathers, by the apprehension of being burdened beyond their ability, from continuing and keeping his wife's children in such relation with their mother as to receive her constant watchfulness, care, and training, and the beneficial enjoyment of her companionship.[24] *Englehardt* v. *Yung's Heirs*, 76 Ala. 534, 542 (1884).

Alabama's substitute-father rule in ADC militates against this public policy of encouraging marriage and family life. It deters marriage; it deters the opportunity for establishing the friendships which lead to marriage. It

---

[24] Similar considerations—a concern with deterring marriages between mothers and prospective stepfathers, and proper relations thereafter—have influenced legislatures elsewhere against imposing automatic support liability on stepfathers. See, *e.g.*, tenBroek, *The Impact of Welfare Law upon Family Law*, 42 Calif. L. Rev. 458, 479 (1954).

does this at the same time that it flouts the congressional intent to aid the needy child who lacks a father in the home with a duty to support him.

Appellants' final rationale—that the "substitute father" regulation allows more money to be made available to the children who do not have their ADC aid cut off because of it—is, of course, true. It is also irrelevant, for it does not speak to the reasonableness of the difference between the children classified as ineligible and those classified as eligible. Any restraint, however arbitrary and capricious, will reduce the number of recipients and so possibly increase the benefits available to the remaining children. To say that a discrimination makes it possible to treat those favored by it more liberally can hardly be accepted as a justification for the practice. Such preference is of the essence of discrimination.[25]

The inappositeness of the substitute-father rule as a device for attainment of the objectives advanced in justification by the State of Alabama cannot but raise fears that the rule is in fact based on a much more elemental policy —simple moral disapproval of the mother's association with a man to whom she is not married. The reason that Alabama so desperately seeks to avoid this conclusion is that such characterization would reveal the substitute-father rule to be nothing more than a substitute for the

---

[25] Nor can Alabama argue that the regulation is needed to save its money. *Cf. Edwards* v. *California*, 314 U.S. 160, where a statute which prohibited persons from assisting indigent non-residents to enter the state was held unconstitutional despite California's effort to justify the statute on the ground that the influx of indigent persons in need of public assistance would create financial problems of "staggering" proportions (314 U.S. at 173). If protection of the public purse is not a proper justification for the arbitrary denial of legal rights to non-residents, *a fortiori* such a purpose cannot justify arbitrary classification of residents. See also, *Collins* v. *State Board of Social Welfare*, 248 Iowa 369, 81 N.W.2d 4 (1957).

"suitable home" requirement struck down by Secretary Flemming in 1961:

> I have concluded that when a needy child who otherwise fits within the Aid to Dependent Children program of the State is denied the funds that are admittedly needed to provide the basic essentials of life itself, because of the behavior of his parent or other relative, the State plan imposes a condition of eligibility that bears no just relationship to the Aid to Dependent Children program. I therefore believe that this Department should inform the State agencies administering Aid to Dependent Children plans that eligibility conditions with the effect described above are not compatible with entitlement for continued Federal grants.[26]

As the United States Congress affirmed, by implication, the "Flemming Ruling" in 1962,[27] and concomitantly disapproved eligibility restrictions based on moral considerations, Federal law would preempt any assertion of a justifying State interest founded in similar considerations.

These, then, are the fanciful conjectures with which Alabama seeks to justify its "substitute parent" regulation: that its arbitrary redefinition of "father" is needed to deter illicit relationships (when, in fact, it encourages such relationships); that the substitute-father regulation is needed to impose support liability of fathers of illegitimate children (when, in fact, no such liability is imposed

---

[26] Notice of this ruling was given to all "State Agencies Administering Approved Public Assistance Plans," including the Alabama Department of Pensions and Security, on January 17, 1961 in State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education and Welfare, page 1.

[27] See, Pub. L. 87-543, §107(b) (1962), 42 U.S.C. §604(b).

by the regulation); that sexual partners of women *should* support children not their own (when, in fact, the Social Security Act is not directed towards regulating the morality of unrelated males, but to protecting the lives and health of needy children); that it is reasonable to discriminate against some needy children because others are benefitted by such discrimination.

To deal with such assertions, this Court has ample precedent:

> Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture . . . They cannot stand as reasonable if they offend the plain standards of common sense. *Hartford Steam Boiler Inspection Co.* v. *Harrison*, 301 U.S. 459, 462.

B. *Special Scrutiny of ADC Eligibility Rules Is Required Because of Their Drastic Effect on the Ability of the Very Poorest and Most Helpless Children to Maintain Life Itself.*

The basic principle governing the application of the Equal Protection Clause to state classifications was stated by this Court in *Gulf, Colorado and Santa Fe Railway* v. *Ellis*, 165 U.S. 150, 155, and numerous times since then:

> [T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

This Court has also stated that classifications will not, in the usual instance, be set aside if "any" reasonable state

of facts can be found to justify it. *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U.S. 580, 584. We have shown that there is no reasonable state of facts which justifies the classification here in question. However, we also believe that the distinctions involved in application of the substitute-father rules would violate constitutional guarantees of equal protection, even if some marginal credence is given to Alabama's proffered justifications.

This Court has "long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 670; *Griswold* v. *Connecticut*, 381 U.S. 479, 498; *Skinner* v. *Oklahoma*, 316 U.S. 535, 541. "Strict scrutiny" is particularly required where fundamental personal rights of poor and politically powerless minorities have been drastically affected by the classification. Cf. *Griffin* v. *Illinois*, 351 U.S. 12, 23-24 (Frankfurter, J., concurring); *Harper* v. *Virginia Bd. of Elections, supra; Hobson* v. *Hansen*, 269 F. Supp. 401, 507-08 (D.D.C. 1967);[28] see also *United States* v.

---

[28] In *Hobson*, Circuit Judge Skelley Wright reaffirmed and explained the principle that a classification involving poor and politically impotent minorities must be examined more carefully than would be usual because it cannot be so readily presumed that a legislature will deal fairly with their interests (269 F. Supp. at 507-08):

> This need for investigating justification is strengthened when the practice, though not explicitly singling out for special treatment any of the groups for which the Constitution has a special solicitude, operates in such a way that one such group is harshly and disproportionately disadvantaged. *See Griffin* v. *Illinois*, 351 U.S. 12 (1956) and its progeny . . . *See also Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) . . .
>
> The explanation for this additional scrutiny of practices which, although not directly discriminatory, nevertheless fall harshly on such groups relates to the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predi-

Carolene Products Co., 304 U.S. 144, 152-153, n. 4, in which this Court recognized that:

> [p]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Rarely, if ever, has a case come before this Court where the classification demands more careful and close scrutiny than this one does. The discrete and insular minority in this case is the most helpless and politically impotent in our land: young children, impoverished to the point where they live at levels even below welfare standards, virtually all-Negro.[29] They are to be punished for the prejudices of

---

cated in the confidence courts have that they are just resolutions of conflicting interest. This confidence is often misplaced when the vital interests of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure . . . may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities and the poor, than would otherwise be necessary.

Cf. *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Takahasi* v. *Fish and Game Commission*, 334 U.S. 410; *Oyama* v. *California*, 332 U.S. 633; *Truax* v. *Raich*, 239 U.S. 33.

On the general distinction between these lines of equal protection cases and cases involving economic regulation (e.g., *McGowan* v. *Maryland*, 366 U.S. 420), see McKay, *Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963).

[29] Whatever view one may take of the appellee's contention that the regulation in question was motivated by intent to racially discriminate (and *amici* believe, on the record of this case, that it was), there is no dispute that the regulation has the effect of discriminating against Negroes. See the comment of the court below, 277 F. Supp. at 37, n. 7. See also Plaintiff's Exhibits 25, 31, 41.

our society or the sins of their parents, but not for anything that they can possibly affect.

The personal rights involved in this case may be based on statute, the Social Security Act, but they are nevertheless as fundamental as any of the rights affirmed by this Court. At issue is whether or not the children in question shall live or starve. (One might note, as the chairman of a special Senate subcommittee did recently, that "whether the term used is malnutrition, hunger, or starvation makes little differences. Eyewitnesses, including members of this subcommittee, have observed and reported conditions that this subcommittee has described as 'shocking' and as constituting a national emergency. These conditions are not new. . . . Nor are they peculiar to Mississippi. They exist in other states. They exist in other areas of the country." Senator Clark, *Hearings on Hunger and Malnutrition in America,* Before the Subcommittee on Employment, Manpower and Poverty of the Committee on Labor and Public Welfare, U.S. Senate, 90th Cong., 1st Sess., July 11, 12, 1967.) We cannot believe that a state regulation which deprives young children of the very opportunity for life which the Social Security Act was designed to protect involves a lesser right than the right to an equal opportunity for education involved in *Brown* v. *Board of Education,* 347 U.S. 483, or the "right to procreate" involved in *Skinner, supra.* In another context, Mr. Justice Douglas asked: "Is the right of a person to eat less basic than his right to travel which we protected in *Edwards* v. *California,* 314 U.S. 160?" *Bell* v. *Maryland,* 378 U.S. 226, 255. Clearly, not.[30]

---

[30] Page 17 of Appellant's Brief contains the astounding statement that "the picture suggested [by plaintiffs below] was that if a mother did not receive her ADC grant, the children starved. As it turned out many of the mothers married," citing an "exhibit" not introduced into evidence, Exhibit E to appellants' Brief. Assuming the exhibit is valid,

The numbers of children whose very lives are involved in the outcome of this case are large indeed; 18,000 in Alabama; 23,200 in Georgia (*Roussaw* v. *Burson*, M.D. Ga., C.A. No, 2323, Temporary Restraining Order of March 18, 1968), at least 10,000 in Louisiana (*Griffin* v. *Bonin*, USDC, W.D. La., C.A. No. 13,521, per curiam opinion granting a Temporary Restraining Order, March 7, 1968), and countless more in other states. Should there be any doubt about the arbitrary nature of Alabama's regulation, surely it should be most closely and carefully scrutinized.

Such scrutiny will, we are convinced, remove any possible impediment to a conclusion of the arbitrary nature of the substitute-father regulation. Lacking any rational justification, the regulation denies essential ADC financial assistance to children who are in fact needy and deprived of parental support due to the death or absence of their father. The financial needs of these children are no less acute than the needs of those who continue to receive aid. Their dependency is no less severe. They are not responsible for and cannot control the circumstances of their birth or the behavior of their mother. They are the helpless victims of an invidious regulation which denies them the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

---

several comments are appropriate: (1) Exhibit E, giving statistics on marriage in Dallas County, Alabama, alone, shows that out of a grand total of 238 cases closed or denied because of the regulation, only 24 mothers married; (2) no indications of the income status of those 24 mothers is given; (3) only 19 of the 238 cases were reported as having "income sufficient to meet need". No light is shed by Exhibit E on the health conditions of the other 219 mothers (and their many more children), except that one may assume that many of them did not have income sufficient to meet need during the time ADC was denied to them.

CONCLUSION

The Court should hold that substitute-father regulations violate the Social Security Act and the Fourteenth Amendment and that States may treat as "parents," for the purpose of ADC eligibility only persons with a legal obligation to provide support. The decision below should be affirmed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
LEROY D. CLARK
CHARLES STEPHEN RALSTON
10 Columbus Circle
New York, New York 10019

Attorneys for the NAACP Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent

EDWARD V. SPARER
127 Wall Street
New Haven, Conn.

PAUL DODYK
BRIAN GLICK
401 West 117th Street
New York, New York 10027

Attorneys for the Center on Social Welfare Policy and Law